

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**KIRKSTALL ROAD ENTERPRISES, INC./
QUAY STREET ENTERPRISES, INC.
Employer**

and

Case No. 2-RC-23547

**WRITERS GUILD OF AMERICA EAST
Petitioner**

Eric R. Greene, Esq., Counsel for the Union
J. Patrick Butler, Esq., Counsel for the Employer
Rhonda Gottlieb, Esq. and Greg Davis, Esq.,
Counsel for the Regional Director

Decision

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on July 27 to 29 and August 3, 11, 12, 15 and 16, 2011.

The Petition in this case was filed on October 12, 2010. Pursuant to a Stipulated Election Agreement approved on November 1, 2010, a mixed mail ballot and manual election was conducted from November 17, 2010 through December 10, 2010. The unit consisted of:

All full-time and regular part-time Producers, Field Producers, Post Producers, Associate Producers, Story Producers, and Senior Story Producers employed by the Employer at and out of its facility located at 609 Greenwich Street, 9th Floor, New York, New York, but excluding all other employees, guards and supervisors under the Act.

The Initial Tally of Ballots was issued on December 13, 2010 and showed that of approximately 83 eligible voters, 25 cast ballots for the Union, 24 votes cast ballots against unionization, two cast void ballots and ten ballots were challenged.

On December 20, 2011, the Employer filed objections to the election.

On January 25 and 31 and February 2, 2011, the Regional Office conducted a hearing to determine only the eligibility of certain of the challenged ballots.

On March 3, 2011, Rachel F. Preiser, a hearing officer, issued a Report and Recommendations on Challenges. In that report, she sustained the challenges to the votes of Teresa Mathews, Stacy Dobrinski, Eileen Lucas and Emily Snyder. She also concluded that the Megan Robertson was an eligible voter.

On March 30, 2011, the Board mistakenly issued a Decision and Certification of Representative. This was amended on April 6, 2011, when the Board adopted the Hearing Officer's report and remanded the objection allegations to the Regional Director.

A revised Tally of Ballots was issued on July 27, 2011. This showed that 30 ballots were cast for the Petitioner; 25 votes were cast against union representation; 2 were void ballots; and that the challenges to 4 ballots were sustained.

On June 28, 2011, the Acting Regional Director issued a Complaint in Case No. 2-CA-40320 that essentially alleged that the Company illegally discharged Mark Brice.

On July 12, 2011, the Acting Director consolidated the hearings in 2-RC-23547 and 2-CA-40320.

Subsequently, the parties settled the allegations of 2-CA-40320, leaving for resolution only the allegations that constitute the Employer's objections to the election. These objections, all of which involve the mechanics of the mail ballot portion of the election were as follows:

The Employer objects to the Region's conduct of the election. Of the approximately 55 individuals who were eligible to receive a mail ballot in the election, several individuals never received a ballot in the mail while several others returned ballots days prior to the deadline for the return of ballots which were not counted. In addition, several individuals telephoned the Region well in advance of the deadline for their return of ballots and specifically requested that they be sent a mail ballot, but either never received a ballot or received ballot only days prior to the deadline for return. Furthermore, a ballot for a separate mail ballot election being conducted by the Region was included (but not counted) with the ballots cast in this election, raising questions as to the integrity of the ballots and the process.

The conduct of the election adversely affected the result. Accordingly, the Employer submits that the election should be overturned and a re-run election ordered.

Concluded Findings

This election was accompanied by a campaign by the Union and the Company. The evidence shows that the Union made substantial efforts to reach and convince employees to vote in its favor. By the same token, the evidence shows that the Company made it clear to the employees that it desired that they vote against union representation.

The Objections in this case do not allege any misconduct by the Union. Nor is there any evidence of misconduct by the Board's Regional Office in the manner in which this election was conducted. Indeed, the evidence in this case convinces me that the Region's personnel did their best to enfranchise all potential voters. In my opinion, the only question here is whether due to inadvertence or unintentional error, certain ballots were lost or misplaced somewhere between their sending and receiving. The next question is if so, whether this resulted in a sufficient number of people not having their ballots counted so as to make a possible difference in the outcome of the election. In this regard, since the result of the election was 30 to 25 in favor of the Union, the Employer would need to show that there were at least five potential eligible voters who were disenfranchised. Assuming that these five cast their ballots against

representation and none cast votes in favor of the Union, this would result in a tie vote and the Union would lose the election.

I note that the group of people that comprised the voting group were, for the most part, freelance employees who work for multiple employers during the course of their careers. Also, their work is fairly mobile and therefore it may take them to various locations in the country.

In support of its Objections, the Employer produced evidence that the following individuals did not receive their mail ballots.

Elisia Gbur
Charles Smith
Rebecca Morton
Michael Wechsler

The Employer also produced evidence in support of its contention that the following employees received ballots but that despite being mailed, they were not received and counted at the NLRB.¹

Nora Connor
Jacob Benattia
Allison Howard
Jill Sinclair
Deborah Moe Mitchell
Zachary Wozniak

The Stipulated Election Agreement was executed on November 1, 2010 and provided for a combined manual and mail ballot election. The pertinent sections of the agreement are as follows:

Eligibility

The Stipulated Election Agreement states that: "Eligible to vote are those individuals ... who worked 100 hours or more in the 34 weeks prior to October 9, 2010 regardless of the week or weeks within that 34 week period when such hours were worked. Ineligible to vote are those employees who have (a) voluntarily resigned or (b) had been discharged. In the first respect, the fact that an individual completed a project for the Employer shall not, by itself, constitute a resignation."

In effect, this means that any person in an included category who was employed by the Employer on a project for more than 100 hours between the dates of February 23 and October 9, 2010 would be eligible to vote.

¹ Initially the Employer contended that an employee named Jamie Iracleanos had returned a ballot that was not received at the Regional office. However, no evidence was produced to support this claim. Indeed, other evidence was produced that tends to show that Iracleanos was mailed a ballot and that he did not mail it back.

The Mechanics of Election

The manual part of the election was to be held on November 30, 2010 between 8:30 a.m. to 10 a.m. and from 1 p.m. to 4 p.m. at the Employer's facility located at 609 Greenwich Street, New York, New York.

The mail ballot portion of the election required that ballots be mailed out to employees on November 17, 2010 and received by the Regional office no later than December 10, 2010.

Pursuant to the Agreement, the Employer was required to submit two lists. The first was the standard Excelsior list setting forth the names and addresses of all employees that the Employer considered to be potential eligible voters. (Of course any names submitted by the Employer were subject to challenge by the Union). The second list contained the names and addresses of those employees who would be eligible to receive mail ballots and who could either vote by mail or vote at the manual election. (Suitable arrangements were made so that votes would not be counted twice).

As noted, there was a group of employees who were supposed to vote by way of a manual election on November 30, 2010. These ballots, which were cast on November 30, 2010, were then impounded for opening after the mail ballots were received and when both sets of ballots would be commingled and counted on December 13.

Employees who were to receive mail ballots were those people who at the time of the manual election were employed by the company but would be out of town on assignments *and* those people who, at the time of the election, were not currently employed on company projects.

The employees who had been placed on the mail ballot list were to be sent ballots on November 17, 2010. Pursuant to the terms of the Stipulated Election Agreement, either party could request that a person who was not on the mail ballot list be added to that list essentially because the person would not be available in New York on November 30. Also, there were three people who had been omitted from the Excelsior List but who were added to the mail ballot list. This was done because the Union advised the Board and the Employer that in its opinion, these three individuals were eligible to vote, should be put on the mail ballot list and be subject to challenge in the event that the Employer felt that they were ineligible voters. In this connection, these three individuals were sent mail ballots on November 17 even though they were not on the Excelsior List.

In addition, the record shows that the Union advised the Board and the Employer that the addresses of a number of people on the mailing list were incorrect.² If that was brought to the attention of the Board before November 17, mail ballots were sent to the corrected address. If brought to the attention of the Board after November 17, duplicate ballots were sent to the corrected address. (Obviously, there was a procedure to eliminate the possibility of counting one person's vote multiple times).

Finally, there were two or three situations where the Union advised the Board after November 17, that individuals did not receive ballots. In this regard, the Union's witness testified that he and other union agents made efforts to contact the potential voters after the ballots were mailed out and if they did not get any response, they notified their counsel who notified the

² People who work in this industry do a lot of traveling and may change their mailing address if they are assigned to a long term project either by this employer or another employer.

Board that these people may not have received ballots. He testified that the Union did this as a matter of caution. In such circumstances, the Board did send out duplicate ballots. In one or two cases, where duplicate ballots were sent out and where a request was made for another duplicate ballot, a regional office employee telephoned that person to ascertain if they had or had not received a ballot.

On November 17, 2010, manila envelopes containing a voting kit were mailed to the voters on the mail ballot list. This kit contained of a list of instructions, a ballot, a blue envelope and a bright yellow envelope. The person receiving the kit was supposed to mark his or her ballot; seal it inside the blue envelope; seal that inside the yellow envelope which was addressed to Region 2, (containing postage), and place his or signature on the back of the yellow envelope.

All mail is received at the Region by a support staff person and the mail ballot envelopes are segregated from the rest of the mail. These are then routed through various people to the election department where they are placed in a bin having the case number on it by the election clerk. At the time of this election there was at least one other mail ballot election being held and this involved this Union and another Employer. Therefore, there were at least two separate bins where mail ballots from two different elections were placed. The case numbers on both bins were similar because the petitions were filed close in time.

Under the Region's procedure, if a mail ballot was received after the agreed upon return date (December 10), but before the counting date, that vote would have been counted, absent a valid challenge on some other ground. Thus, if a person mailed his or ballot on December 8 or 9 and if it was received on December 11 or 12, it would have been counted. There is no evidence that this occurred in this election, although there was one eligible voter, Allison Howard, who testified that she placed a ballot in a mail box in Brooklyn at about 5 p.m. on December 8, 2010, (after most pickup times), and whose ballot might therefore have not been received by December 10.

On the day of the count, (December 13), the mail ballot envelopes were brought by the Board agents to a room where the parties' representatives were assembled and the outer envelopes were opened in their presence. However, before being opened, all parties had the opportunity to challenge any particular voter and if there was a challenge, that envelope was set aside for later resolution. Where there were no challenges, the voter's outer envelope was opened and the blue envelopes were commingled with the others. At some point, the shuffled up blue envelopes were commingled with the manual ballots and they all were counted after a number of challenges were withdrawn.

In this case, it was discovered at the outset of the meeting that there was a mail ballot in the bin that belonged to a voter from a different election. At that point, the process was stopped and this ballot was set aside and was never counted. The Board agents then went back and scoured the election office to see if there were any missing ballots. Announcing that there were none, the process resumed. At the end of the day, a Tally of Ballots was issued, after which the Company's representatives caucused at their office to find out what happened to the votes of certain employees whose ballot envelopes never showed up at the Board's office. In this respect, the Company assigned a number of supervisors to call up employees to ask if they had received ballots and if so, if they had mailed them in.

As can be seen from the above, this process is a great deal more complicated than a typical manual ballot election. And since ballots were sent out by mail for return by a date

certain, to multiple people throughout the United States who tend to move about in the course of their work, there was some possibility for inadvertent error.

I also note that the Union in this case had contemporaneously filed petitions involving employees at three other companies. In all of these cases, elections were held and these were conducted with a mail ballot component. All four petitions were filed close in time and in at least one of these, the ballots were sent out and received back during an overlapping time period as the Kirkstall election. Thus, the reason that there was more than one bin for mail ballots in the election department was that there were ballots coming in from employees at two employers. This might explain why at the Kirkstall election count held on December 13, a mail ballot from another election was in the bin containing the Kirkstall mail ballots.

Of more significance, the Employer showed that at a later mail ballot election, two mail ballots showed up that belonged to another election that had occurred much earlier and that did not involve the WGA. The significance of this is that this incident shows that in a mail ballot election involving a different employer, two mail ballots had been misplaced and were not counted in that previous election. Thus, the Employer demonstrated that it is within the realm of possibility that mail ballots can and have been misplaced in the past. It therefore argues that this past precedent corroborates the testimony of its witnesses, whose mail ballots were not received by the Board, but who swore that they had, in fact, mailed in their ballots.

Assuming *arguendo* that there were some misplaced ballots, the next question is would it have made any difference?

The Employer presented two witnesses, Rebecca Morton and Zachary Wozniak who testified that did not receive mail ballots. However, both of these employees were living in the New York Metropolitan area and were employed on company projects as of November 30, 2010. They therefore were not, under the terms of the Stipulated Election Agreement, eligible to receive mail ballots.³ In fact, the only reason that Wozniak asked for a mail ballot is that he showed up late at the manual ballot election after it was over. As neither of these two employees was eligible to receive mail ballots, it is of no consequence that they not receive such ballots.

The Employer called Charles Smith as a witness and he claimed that he never received a ballot. Mr. Smith lives in Manhattan with his family and was not employed by the Company at the time of the manual election. Payroll records produced pursuant to subpoena showed that Smith only worked a total of 33.6 hours for the Company during the period from February 23 to October 9, 2010. He therefore was not an eligible voter and therefore was not entitled to vote by mail or in the manual election. Accordingly, his alleged failure to receive a mail ballot is irrelevant.⁴

The Employer called Alicia Gbur to testify about her ballot. After listening to her testimony and reviewing various documents relating to her situation, I conclude that she received a ballot but never mailed it back. As she told her supervisor, Mike Sheridan, she may

³ Neither party requested that these two individuals be sent a mail ballot either before or after November 17, 2010.

⁴ I note that in its letter to the Region in support of its Objections, the Company represented that Charles Smith was an eligible voter who did not receive a ballot. It was however, conceded that at the time this letter was sent, the company was aware that Smith had not worked sufficient hours within the prescribed time period to be an eligible voter.

have mixed the ballot up with her old newspapers and thrown it out. Significantly, she refused to sign a statement prepared for her by a company attorney averring that she had not received a ballot.

5 Michael Wexler testified that he never received a ballot from the Board. He further testified that at that time, he was not even aware that there was an election being held at Kirkstall or that he was an eligible voter. This latter assertion is simply not true inasmuch as the unequivocal evidence shows that Richard Vagg, an executive producer sent a text message to Wexler on November 18 advising Wexler that he was eligible to vote and that he would be receiving a ballot in the mail. Wexler sent a text message in response on November 19.⁵

10 Wexler also testified that he owns his own business which he operates out of his home in Hoboken New Jersey and that during the week of Thanksgiving he was in California for a couple of days. (At around the time that the ballot would have been received). Wexler testified that he receives a great deal of mail; personal, business and other mail that we would describe as “junk” mail. In my opinion, it is more likely than not that as in the case of Alicia Gbur, the envelope that was sent to his home by the Board, was received while he was out in California and was simply discarded without being opened.

20 Jacob Benattia testified that he received a ballot at his parent’s house in Miami Florida and that he mailed it back to the Board’s office. He testified that at that time, he was between residences and spent some of his time at his parent’s house and part of his time at another location. When he was asked on cross examination about the details of the mailing that he received from the NLRB, his memory was not so good. He could not recall how many envelopes were in the mailing, whether there were any instructions enclosed, or whether the items were in any colors other than white. (As noted above, the ballot was supposed to be placed in a blue envelope, which in turn would be placed inside a yellow envelope that was addressed to the Region’s office). Benattia acknowledged that receiving an NLRB ballot was an unusual event for him and it doesn’t seem to me that he would fail to remember at least some of the details. In short, I am not going to credit his testimony that he mailed the ballot back to the NLRB.⁶

35 Jill Sinclair testified that she received a ballot on November 22 and mailed it by dropping it into a mail box outside a Post Office on Monday, December 6. On cross examination, when she was asked how and through whom she learned that her ballot was at issue, her recollection became a lot worse. She testified:

Q How did you find out that your ballot was in question in this case?

A Honestly I don’t remember. I’m assuming from ITV.

40 Q Well, were you contacted by the Writer’s Guild about your ballot?

⁵ The text messages were saved on Vagg’s I-phone and all parties had the opportunity to view them. The text of the November 18 message was read out in court.

45 ⁶ One might ask what might motivate an employee to testify falsely about a ballot. One reason might be that when asked by a supervisor if he or she voted, the employee might have been too embarrassed to acknowledge that he did not vote and then after signing a statement that the ballot was mailed, feel trapped into sticking with that story. Another possibility is that an employee in this type of situation might plausibly seek to curry favor with those management people who can determine if he or she will be employed by the Company in the future. Benattia, like most of the other employees in the voting unit, is a freelancer who does not have a permanent position and who needs to get jobs from multiple employers on a project by project basis.

A No.

Q Okay. Were you contacted by the National Labor Relations Board about your ballot being –

A Not that I remember.

5 Q Okay, so then you would have been contacted by the Employer, correct?

A I don't remember anyone contacted me, honestly.

Q Okay, all right. Well, let me see if I can refresh your recollection.

* * *

10 Q Okay, Ms. Sinclair, if you could take a look at what's been marked for identification as Petitioner Exhibit 9, which is an e-mail thread as well as an unsigned witness statement, do you see those documents?

A. Yes

15 A Okay. Referring to the e-mail at the bottom of the first page from Jason Guberman to you, it says; "Hi Jill, as discussed, attached this statement along with the FedEx," do you see that?

A Yes

20 Q Okay. Having now seen that e-mail between Mr. Guberman and yourself does that refresh your recollection as to how you became aware that your ballot was in question in this case?

A I mean, I don't think he was notifying me of that in this statement.

Q Okay. So somebody – is it fair to say that somebody spoke to you – someone in Kirkstall corresponded with you prior to Mr. Guberman's e-mail on December 20th?

A Yes

25 Q Okay and who would that person have been?

A I don't know. I don't remember.

Q Okay. You don't remember the first time that you were told that your ballot was in question?

A I don't.

30 Q Do you know Mike Sheridan?

A I do know Mike, yes.

Q Okay. Who is Mike Sheridan?

A Our executive producer

Q Okay. Did Mr. Sheridan contact you to tell you that your ballot was in question?

35 A I don't remember

* * *

Q Okay. So where Mr. Guberman – do you know who John Kim is?

A Yes

Q Who is John Kim?

40 A He's the executive producer.

* * *

Q Okay

A I've never met or talked to John but –

45 Q Okay. Well – so who did you speak to at Kirkstall to learn that your ballot was in question?

A I don't remember.

Q Okay. So when Mr. Guberman says "Hi, Jill, as discussed," do you recall having any conversation with Mr. Guberman about your ballot being in question?

A I must have.

50 Q Okay

A I do not remember a conversation.

Q Okay Do you remember – well, take a look at what’s been marked for identification as Petitioner Exhibit 10 please?

* * *

Q That’s your signature, correct?

A Yes

Q Okay. How—did you prepare this document?

A I did not.

Q Okay. Tell us how it was prepared?

* * *

Q How did you get this document?

A Jason Guberman.

Q E-mailed it to you?

A E-mailed it to me.

Q Okay. Do you know whether Mr. Guberman created the document?

A I don’t.

Q Okay. So explain to us the process in which you signed this witness statement.

A. I read through it to make sure everything was correct to the best of my knowledge and signed it.

Q Okay. So is it fair to say that Mr. Guberman asked you to sign the witness statement?

A Yes.

* * *

Q. So you don’t recall any conversations with anyone other than Mr. Guberman?

When I say – I mean Kirkstall, you know managerial or executive people. Other than Mr. Guberman you don’t recall speaking with anyone else about your ballot being in question?

A I don’t.

Although Sinclair testified that she received a ballot and mailed it in, I am not going to credit her testimony. As shown above, her recollection of the events surrounding being contacted and being questioned about her ballot by the Company’s management was virtually non-existent. Stating that she mailed in the ballot is rather easy. Testifying about the surrounding details, however, seems to have been rather more difficult.

This leaves only four eligible voters where there is evidence that they either did not receive a ballot (Rebecca Morton) or that they mailed ballots that were not received by the Board’s Regional Office (Nora Connor, Debra Moe Mitchell and Allison Howard). Even assuming that all four of these individuals would have voted “no” the final tally would have been 30 votes in favor of the Union and 29 votes against unionization. As such, even if counted, the votes of these four individuals could not possibly affect the outcome of the election. See for example, *Borg Warner Corp.*, 254 NLRB 597 (1981).

Based on the above and the record as whole, I conclude that the Objections have no merit and should be dismissed.

ORDER

The representation case in 2-RC-23547 is to be remanded to the Regional Director of
5 Region 2, for the purpose of issuing the appropriate Certification of Results.⁷

Dated, Washington, D.C., August 30, 2011.

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Raymond P. Green
Administrative Law Judge

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⁷ Any party may, within fourteen (14) days from the date of September 13, 2011 issuance of this
recommended Decision, file with the Board in Washington, DC, an original and eight (8) copies of
50 exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a
copy thereof on the other parties and shall file a copy with the Regional Director of Region 2. If no
exceptions are filed, the Board will adopt the recommendations set forth herein.